Filed 2/16/05 P. v. Anderson CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent v. IRVIN DONALD ANDERSON, Defendant and Appellant.	F044930 (Super. Ct. No. F02676161-3) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Gregory Fain, Judge.

Eileen S. Kotler, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Stan Cross and Daniel Bernstein, Deputy Attorneys General, for Plaintiff and Respondent.

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STATEMENT OF THE CASE

On December 16, 2003, a consolidated first amended information was filed in the Superior Court of Fresno County charging appellant Irvin Donald Anderson with counts I

and II, assault with a firearm (Pen. Code, § 245, subd. (a)(2));[1] counts III and IV, criminal threats (§ 422); count V, discharging a firearm with gross negligence (§ 246.3); count VI, possession of a firearm by an ex-felon (§ 12021, subd. (a)(1)); count VII, assault on a peace officer (§ 245, subd. (c)); and count VIII, resisting an executive officer (§ 69). As to counts I, II, III, and IV, it was further alleged appellant personally used a firearm (§ 12022.5, subd. (a)(1)). It was also alleged appellant suffered four prior serious and/or violent felony convictions within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12), two prior serious felony convictions (§ 667, subd. (a)), and served five prior prison terms (§ 667.5, subd. (b)). Appellant pleaded not guilty and denied the special allegations.

Also on December 16, 2003, appellant stipulated to his status as a convicted felon as to count VI, and provisionally waived a jury trial and admitted the prior convictions and special allegations pending the verdicts. Based on these admissions, the court found he actually suffered three prior strike convictions, two prior serious felony enhancements, and only one prior prison term enhancement. Thereafter, his jury trial began on the substantive offenses.

On December 18, 2003, appellant moved to dismiss counts III and IV, criminal threats, pursuant to section 1118.1. The court granted the motion as to count IV but denied it as to count III. On December 19, 2003, the court reconsidered the motion and dismissed count III.

On December 22, 2003, appellant was convicted of counts I and II, assault with a deadly weapon, and that he personally used a firearm; count V, discharging a firearm with gross negligence; and count VI, possession of a firearm by an ex-felon. Appellant was found not guilty of count VII, felony assault on a peace officer, but guilty of the

[1]All further statutory citations are to the Penal Code unless otherwise indicated.

lesser included offense of misdemeanor assault (§ 240). He was found not guilty of count VIII, felony resisting an executive officer, but guilty of the lesser included offenses of misdemeanor resisting arrest (§ 148, subd. (a)(1)) and misdemeanor assault on a peace officer (§ 241, subd. (b)).

On February 6, 2004, the court denied appellant's motion to dismiss the prior strike convictions, denied probation, and imposed an aggregate term of 64 years to life as follows: as to count I, the third strike term of 25 years to life, with a consecutive term of four years for the firearm enhancement, a consecutive term of five years for the prior serious felony enhancement, and a consecutive term of one year for the prior prison term enhancement; as to count II, a consecutive third strike term of 25 years to life, with a consecutive term of four years for the firearm enhancement; as to count V, another third strike term of 25 years to life, stayed pursuant to section 654; and as to count VI, a concurrent third strike term of 25 years to life. As to the three misdemeanor offenses, the court imposed concurrent terms of 30 days for each conviction, with credit for time served. The court also ordered appellant to submit blood and saliva samples for the state's DNA database pursuant to section 296.

On February 13, 2004, appellant filed a timely notice of appeal.

FACTS

Appellant Irvin Donald Anderson was charged with eight felony counts based on two separate incidents. The first incident occurred on September 23, 2002, and involved a dispute over money between appellant and James Richard Ray. The second incident occurred on January 15, 2003, and involved appellant's decision to park in a restricted area for police cars only.

Appellant, who was 70 years old at the time of trial, was ultimately convicted of four felony counts and three lesser included misdemeanor offenses, and sentenced to multiple third strike terms. On appeal, he contends the prosecutor committed prejudicial misconduct during closing argument when he said appellant's prior felony convictions

showed he had a propensity for violence. Appellant also asserts the matter must be remanded for resentencing because the court incorrectly believed it was required to impose consecutive third strike terms for two counts. Finally, appellant argues the court's order for him to provide blood and saliva samples for DNA testing violated his constitutional rights.

Counts I through VI

Brian Campbell and his family lived on North Nelson Street near Belmont Avenue in Fresno County. James Richard Ray (Ray), Campbell's uncle, lived immediately adjacent to Campbell in a motor home. Appellant lived about one mile away, and Ray's father lived between appellant and Ray.

Appellant, Ray, and Campbell were well acquainted with each other. Appellant had known Ray's father for 50 years. Campbell considered appellant to be a family friend. Campbell did not get along with Ray because his uncle "was just basically screwing over my family" by being on drugs and taking advantage of everyone. At the time of trial, however, Campbell had a better relationship with Ray because he was in an alcohol and drug rehabilitation program.

In the spring of 2002, a major construction project was being developed near Ray's property. Ray spoke with the contractor and made a deal to provide a diesel water truck for the project. The contractor agreed to pay Ray based on the actual usage of the truck. The contractor testified that appellant drove the truck during the project. Appellant told the contractor to pay him instead of Ray because he owned the truck. Ray contradicted appellant's claim and stated he owned the truck. Ray showed the contractor his pink slip for the truck, and directed the contractor to pay him instead of appellant. The contractor believed Ray demanded more money than their original agreement, but eventually paid Ray $6,000 for the job.

Ray testified the diesel truck was jointly owned by Ray's father and appellant. Ray claimed appellant overcharged the construction company and was "run off the job"

by the contractor. Ray admitted the contractor paid him and he was supposed to pay appellant. Ray spent the money, however, and he never paid appellant. Appellant found out that Ray had been paid by the contractor and was very angry at Ray.

Around 4:00 p.m. on September 23, 2002, Brian Campbell was outside his house when appellant arrived in his white pickup truck. Ray was outside his motor home and also saw appellant arrive. Ray's girlfriend, Brandi, yelled at Ray to get inside. Campbell testified Ray grabbed a shovel. Campbell testified appellant stepped out of his truck and was holding a gun. The gun was pointed toward the ground. Campbell recognized appellant's weapon as a .38-caliber special revolver. Appellant had shown Campbell the weapon a couple of months earlier at appellant's house.

Campbell testified that appellant walked toward Ray and the motor home. Ray held the shovel at his side. Matt Minter, Ray's friend, was also present. Campbell testified that Ray told appellant to "get the fuck out of there or something." Appellant replied: "'You have my money, and I want it.'" Campbell told appellant to get back in his truck and leave. Appellant said: "'This mother fucker owes me $6000.'" Appellant and Ray continued to exchange profanities. Campbell again told appellant to get into his truck and leave. Appellant looked at Campbell and did not respond, but appellant turned around and headed toward his truck.

Campbell testified that Ray suddenly raised the shovel and looked like he was going to hit appellant. Campbell called out to appellant. Appellant turned around and fired his gun once toward Ray. Appellant was about 10 to 12 feet from Ray when he fired the gun. Campbell testified that he saw the bullet hit the dirt next to Ray, and it made a cloud of dust. When the gun was fired, Minter fell down, cowered on the ground, and called out that he had been shot. Campbell testified Minter was about 40 feet away from appellant, in a diagonal direction, and Campbell believed the shot was not fired toward Minter. Campbell never saw appellant point the gun toward Minter. Campbell learned that Minter was not wounded but just faked an injury.

Campbell again told appellant to get out of there: "'You want to spend the rest of your life in jail for this piece of shit.'" Appellant looked at Campbell with kind of a "peacefully weird" look, "[k]ind of melancholy in an awkward situation." Appellant got back into his truck and drove away.

Ray also testified at trial and described a slightly different version of the incident. Ray testified he had just arrived home when he saw appellant's truck turn onto his property. Appellant was angry and said Ray wasn't going "to screw him out of the money or whatever.… I owed it to him. I had to pay him." Ray replied that he solicited the construction job, appellant still owed Ray money for some mechanic work, and "'[t]o heck with you'" or "screw you." Ray also gestured toward appellant in an offensive manner.

Ray testified that appellant was already out of his truck, but he did not notice if appellant had a gun. After they exchanged words, appellant pulled out a .38-caliber revolver from his pocket but he did not say he was going to shoot Ray. Appellant said something like "fuck you" and the gun went off. Ray testified appellant did not aim or try to shoot him. Instead, appellant pointed the gun to one side and tried to scare Ray. Appellant was "more than a couple feet" away from Ray when he fired the gun. Appellant's shot hit the dirt on Ray's right side.

Ray testified he picked up the shovel after the gun was fired. Ray walked toward appellant and said, "'That's it for you,'" and "'I'm going to take your fucking head off.'"[2] As Ray headed toward appellant, appellant started to raise the gun and Ray decided to withdraw until "another day" because "it was pretty apparent you don't bring a

[2]Ray explained their dialogue as follows: "Me and [appellant] always talk profanity to each other" because "[w]e're both in the construction trade. That's how we talk."

shovel to a gun fight, so I just left it at that." Ray testified appellant "took off" in his truck and left the property.

Ray testified appellant never fired a shot toward Matt Minter. Minter continually yelled and shouted at appellant, and tried to distract him. Ray never saw Minter act as if he was shot, but wasn't surprised by his conduct because Minter was "kind of strange anyways."[3]

Ray and his family went to his father's property because they were afraid that appellant was heading there, but appellant apparently went home. Ray testified he told his family not to call any law enforcement officers but they did so anyway.

At trial, Ray admitted he had prior felony convictions for having a "[c]hop shop and drugs." He had prior convictions for grand theft and possession of methamphetamine, and two convictions for receiving stolen property. He was now attending an alcohol and drug rehabilitation program. He last used methamphetamine about a year ago. Ray admitted he was using methamphetamine at the time of the confrontation with appellant.

Ray insisted appellant was just angry about the money and never threatened or tried to kill him. Ray had never seen appellant with a gun. When appellant arrived on the property, Ray wasn't afraid he was going to shoot him until appellant pulled out the gun. Ray did not want to speak to any officers about this case because "I just kind of just live by a code or whatever that you just, you know – you don't squeal on people and whatever."

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[3]Ray testified Minter picked up a grape stake and tried to sneak up on appellant as he got back into the truck, but appellant drove away. However, Brian Campbell insisted Minter did not pick up a grape stake or participate in the confrontation: "[T]hat pussy didn't do anything. He just sat there."

Fresno County Sheriff's Deputy Ryan Gilbert responded to Ray's property on the dispatch of an assault with a deadly weapon. Deputy Gilbert initially placed Ray in custody until he sorted out the incident. Deputy Gilbert later went to appellant's residence but he was not home. The sheriff's department's helicopter spotted appellant's white pickup truck near appellant's house. The truck was stuck and buried in the loose dirt of an embankment. There were shoe prints that led from the truck through an orchard and onto Belmont Avenue. About an hour later, appellant was taken into custody in Sanger. Appellant's weapon was never found.

After appellant was detained, Deputy Gilbert returned to Ray's property and interviewed the witnesses. Brian Campbell was scared and excited, and he did not want to give a statement. However, Campbell said appellant arrived on the property with a .38-caliber revolver and fired one shot. Ray picked up the shovel after appellant fired the shot, and appellant turned towards Ray and pointed the gun at him again.

Deputy Gilbert released Ray from custody and interviewed him. Ray was also excited and scared, and said appellant got out of his truck and was holding a .38-caliber revolver. Ray said he was about 25 feet away from appellant and never got any closer. Ray said they argued about the money owed for the diesel truck work. Ray said he was afraid because appellant was holding the gun. Ray also said appellant raised the gun toward him and fired one shot, and Ray believed appellant was trying to kill him. Ray said the shot landed about 10 feet to his side, but never said that appellant fired into the ground. Ray said he picked up the shovel in self-defense and walked toward appellant. Someone said the police were on their way, appellant became startled, and he left. Ray never said appellant raised the gun toward him a second time.

Based on this incident, appellant was charged with counts I and II, assault with a deadly weapon on James Ray and Matt Minter; counts III and IV, making criminal threats against Ray and Minter; count V, discharging a firearm with gross negligence; and

count VI, possession of a firearm by an ex-felon. As to counts I, II, III, and IV, it was further alleged appellant personally used a firearm.

The court granted appellant's motions to dismiss counts III and IV, criminal threats against Ray and Minter. Appellant was convicted of counts I and II, assault with a deadly weapon on Ray and Minter, and that he personally used a firearm; count V, discharging a firearm with gross negligence; and count VI, possession of a firearm by an ex-felon.

Counts VII and VIII

Around 1:00 p.m. on January 15, 2003, Fresno Police Officer James Olson was driving back to the anti-gang task force office, located on the corner of M and Merced Streets. He saw a white pickup truck parked at the Merced Street curb, in a restricted area marked, "'Police Parking Only.'" Olson observed appellant and a woman standing on the sidewalk next to the truck. Officer Olson was in an unmarked car and wearing plain clothes. He drove up to the couple, rolled down his window, and yelled two or three times that it was police parking only. Olson did not want the couple to get a parking ticket, but they did not respond. Olson gestured toward the sign and again yelled that it was police parking only. Appellant finally responded in a "boisterous" voice: "'Why don't you mind your own business, asshole?'" Olson did not interpret appellant's response as friendly.

Officer Olson parked his car, removed his jacket so his sidearm and badge were visible, and approached the couple. Olson identified himself as a police officer and held up his badge. In response, appellant entered the driver's side of the truck and started the engine. Olson walked to the driver's door and placed his badge against the driver's side window. Olson repeatedly directed appellant to turn off the engine, roll down the window, and produce his driver's license. Appellant did not respond but looked at Olson and the badge. Appellant and Olson made eye contact. Appellant then looked forward, put the truck into gear, and turned the steering wheel towards the left side, where Olson

was standing. Appellant appeared irritated and the expression on his face "was not friendly. It was more of a mean, angry expression."

Officer Olson testified he immediately stepped away from the truck because he thought he was going to be hit by the vehicle, based on the way appellant turned the steering wheel. Appellant accelerated and the driver's side mirror grazed Olson's left arm as appellant drove away, but Olson was not injured. Olson testified that he might have been run over by the truck's rear wheels if he had not moved away from the vehicle.

In the meantime, Deputy District Attorney Greg Anderson and Agent Ralph Curtis of the Department of Justice were in their office when they heard loud voices from the street. Anderson and Curtis heard someone say, "'Why don't you mind your own business, asshole?'" They looked through the window and saw appellant and a woman, but did not see Officer Olson. They went outside and saw appellant get into the pickup truck, and realized Officer Olson was also present. They watched as Olson held up his badge against the truck's window, identified himself, and told the driver to turn off the engine, but the driver ignored his orders and drove away very fast.

Appellant left behind his female companion when he made his hasty departure. The woman said she was appellant's cousin and they were late for an appointment in the nearby courthouse. She knew Olson was an officer but she did not know why appellant acted the way he did. She identified appellant but did not know the truck's license plate number.

Officer Olson was still speaking with appellant's cousin when he saw appellant drive by them. Olson and appellant again made eye contact, and Olson gestured and called out for him to pull over. Appellant again ignored his directions and drove away, but Olson obtained the truck's license plate number.

About 30 minutes after Officer Olson's initial encounter with appellant, Olson was in the district attorney's office when he looked out the window and saw appellant and his cousin leaving the courthouse. Olson immediately left the office and caught up with

them. Olson advised appellant that he was a police officer and appellant was under arrest. Olson grabbed appellant's arm but appellant pulled away from him. Olson and other officers placed appellant on his knees and handcuffed him, and he was taken into custody.

Based on this incident, appellant was charged with two felony counts: count VII, assault on a peace officer, and count VIII, resisting an executive officer. He was found not guilty of counts VII and VIII, but convicted of the lesser included misdemeanor offenses of assault, resisting arrest, and assault on a peace officer.

Defense Evidence

Appellant testified at trial and admitted he was convicted of felony domestic violence and dissuading a witness in 1993. He was convicted of drunk driving in 1954, and public intoxication in 1956. Appellant also admitted he suffered a misdemeanor conviction in 1992 for carrying a concealed weapon in a vehicle because his girlfriend concealed a gun in his car and he did not know about it.

Appellant testified Ray owed him money for driving the diesel truck. He just found out the contractor already paid $6,000 to Ray, and he wanted his money because Ray was "a crankster, and he might as well took it down and give it to the dope dealer, you know."

Appellant initially went to the home of Ray's father, but no one answered the door. Appellant next drove to Ray's property. Appellant admitted he was angry, but testified he did not possess a gun and did not produce a gun at Ray's house. Appellant spoke to Ray and asked for his money. Ray refused to pay him, and said his father already deposited the check.

Appellant testified that he returned to his truck and drove to the nearby house of Ray's father, but the father would not answer the door. Thereafter, appellant drove back to his own house and parked his truck in front.

Appellant repeatedly testified he never owned a gun and Brian Campbell lied when he claimed appellant previously showed him a .38-caliber revolver. Appellant testified Ray lied that he had a gun or fired at him that day. Appellant used to date Campbell's mother, but appellant did not know why Campbell would lie for Ray. Appellant testified Ray lied because he was "a crankster. Hey, he don't know what he's saying half the time."

Appellant admitted, however, that his truck later became stuck in the embankment when he drove out of his property through an adjoining orchard. Appellant usually left his property by pulling into the street, but he drove through the orchard that afternoon because "there were sheriffs out there." Appellant believed Ray probably called the sheriff because he demanded the money. Appellant left his truck in the embankment and set off on foot for Sanger because he had some business in town.

As for the parking incident, appellant testified he was with his cousin and they were late for court. He parked his truck near the courthouse but he did not know it was a restricted area. Someone yelled at him from a "normal" car, but appellant did not know the man was a police officer because he was just wearing a suit. Appellant denied that he called the person an "asshole," but admitted he told the man to mind his own business. He also might have used profanity and angered the man. Appellant could not hear what the man was yelling about. Appellant never saw a badge but admitted the man was not wearing a coat. The man walked up to the truck and appellant "guess[ed]" he was saying something, but appellant did not hear anything because the windows were rolled up and the radio was on. Appellant testified Officer Olson lied about displaying his badge to him.

Appellant testified he started the engine and moved his truck because he did not want any trouble from the unknown man. "Why do I want to sit it there and get in trouble for, you know. I've been in enough trouble in my life." Appellant did not try to assault or run over him, and the man was not hit by the truck or the mirror. Appellant

testified he did not flee the area or speed away, but instead drove around the block and found another parking space near the courthouse.

On direct examination, appellant testified he "found out later" that he parked his truck in a police stall. He gave a different answer on cross-examination:

> "Q You didn't know you were parked in an illegal parking zone – or excuse me, a police only parking zone; right?
>
> "A Why do those people get to park there and nobody else? What gives them the right to a parking [place] in front of their business like that, if that's what it is.
>
> "Q Okay. Let's go back to the question.
>
> "A No. You answer me. You answer me now."

The court directed appellant to answer the question.

> "Q Let's go back. You did not know that it was a police parking only zone; correct?
>
> "A There's a sign … right there that says police parking only. I seen that, yeah.
>
> "Q And when did you see that?
>
> "A Whenever I parked there.
>
> "Q So you knew when you parked there—
>
> "A I was illegal, right."

Appellant admitted he saw the sign "that says police parking only, but what gives them the right."

> "Q Okay. All right. So you parked there, and you knew it was police parking only zone; correct?
>
> "A Correct."

Appellant again insisted that he didn't know why the man was yelling at him, but he decided to move his truck because "[m]aybe I've got his parking place" and he didn't want any trouble from the meter maids.

DISCUSSION

I.

PROSECUTORIAL MISCONDUCT

Appellant contends the prosecutor committed prejudicial misconduct during closing argument when he asserted appellant's prior felony convictions showed he had a propensity for violence. Appellant concedes the court promptly admonished the jury, but argues the error was so prejudicial that an admonishment could not cure the harm. Respondent asserts the court's admonishment cured any misconduct.

A. Background

As set forth *ante*, appellant testified at trial and admitted he suffered prior convictions for felony domestic violence and dissuading a witness in 1993, drunk driving in 1954, and public intoxication in 1956. Appellant also admitted he suffered a misdemeanor conviction in 1992 for carrying a concealed weapon in a vehicle. James Ray admitted he had prior convictions for grand theft and possession of methamphetamine, two convictions for receiving stolen property, he formerly operated a chop shop, and he was using methamphetamine when the incident with appellant occurred.

During closing argument, the prosecutor initially focused on the evidence which supported the charges based on the incident between appellant and James Ray. The prosecutor argued appellant displayed the requisite specific intent for assault with a deadly weapon. The prosecutor clarified that appellant could be guilty of assault without having the intent to kill Ray.

> "… And that's why we don't have attempted murder here, obviously. But we do have an assault. We do have a situation which could very, very

easily have escalated into much more serious charges. He did have the present ability to carry out physical violence against Mr. Ray in that the gun was loaded. And that's the third element of the CALJIC instruction on assault. We know the gun was loaded cause he fired it. Looking at the facts which surround this act – and this is a violent act. And just as an aside, I'm sure that somebody will bring up later at a later time we have two individuals. Both have criminal records. [Appellant] had the two crimes of violence. Two felony violent crimes back in the early '90's. One was the using force or violence spousal attack, spousal beating. And also another crime of violence, which was dissuading a witness, which is usually force or threatening to use force to somehow dissuade a witness from coming into court or giving comments to police officers. Intervention in some way. On the other hand, we have Mr. Ray, who in his past does have several felonies; car theft, receiving stolen property. There was a grand theft. And he had a simple possession of some Methamphetamine at one time. And those crimes are property crimes. They're not violent crimes. They're against property rather then [*sic*] against the person. So we have two individuals who have prior background. *This gentleman's prior background is of violence, which I think is important*. Mr. Ray's was a property related crime. *And this particular instance is a violent crime. That is, it involves the threat or use of violence*.

"I understand, I think, the motivation behind why [appellant] did what he did. To the point that he was angry. And many of us would have been angry, too, if they felt they had been, in [appellant's] words, bamboozled out of a significant amount of money. We're not here to decide the issues of who had rights to the money or to how much of the money. We're not here to decide a civil case. But that seems to be the motivation why [appellant] went over to the property that day after having found out that Mr. Ray had accepted money from [the contractor]. But given the fact these people have a long background together, that evidently [appellant] had known Mr. Ray's father for 50 years, that he had known Brian Campbell and the people who lived at that residence for a long time, the use of a gun is dispositive to what he could have done. *And this kind of follows along the lines of [appellant's] propensity for violence. If you'll notice the prior crimes which he admitted to as far as in court are violent. This crime involves violence*. And then, subsequently, three or four months later when the other case happened." (Italics added.)

Defense counsel objected to "this propensity argument as to violence. That's not proper." The court immediately instructed the jury:

> "Ladies and gentlemen, let me give you [a] point of clarification. And I'm going to elaborate on this just a moment.... Ladies and gentlemen, as I've already instructed you at the beginning of the case, you must follow my instructions as to the law which apply to this case. And if anything concerning the law said by the attorneys in their arguments conflicts with my instructions on the law, you must follow my instructions. You will receive all of the instructions on the law which I will give you in this case and in the jury room to refer to during your deliberations. If counsel's arguments are inconsistent with those instructions, you may follow my instructions. And I'm not – I just want to clarify one point for you. And that is in regard to the use of prior felony convictions. There have been two witnesses [who] testified. And both of them admitted they had prior felony convictions. You're going to be receiving an instruction on the law that tells you the proper use of prior felony convictions. And that is to the effect of judging the believability of a witness. Its under -- when you get the instructions, it's under [CALJIC No.] 2.20. And the law tells you – and I'm just going to at this point cut to the chase for time purposes. But I want you to consider that entire instruction; okay? But the law tells you that you may in assessing a witness's testimony consider – in your assessing the believability of the testimony you may consider a witness's prior felony conviction. You may consider past criminal conduct amounting to a misdemeanor. And that is only for the purpose of assessing the believability of that witness and not for any other purpose. So with that explanation, I'm going to overrule the objection, and I'm going to ask [the prosecutor] to continue …. *But the jury's to clearly understand that they cannot consider the prior felony convictions of either witness on the subject of propensity for violence. In other words, because somebody's committed a crime in the past they might be more necessarily to in the future. That would be not a proper use for it*. So that matter is clear in the mind of the jury. And with that objection, the objection is overruled.…" (Italics added.)

The prosecutor continued his closing argument and did not refer again to appellant's prior convictions.

In the course of his closing argument, defense counsel briefly mentioned appellant was 70 years old and he had "been around the block. He's got two serious felonies that you've heard about from 1993 that follow him along wherever he goes. Right into this courtroom."

The jury was instructed pursuant to CALJIC No. 2.20, that to determine a witness's believability the jury may consider, as one factor, the witness's prior conviction of a felony. The jury also received CALJIC No. 2.23, which stated:

> "The fact that a witness has been convicted of a felony, if this is a fact, may be considered by you only for the purpose of determining the believability of that witness. The fact of a conviction does not necessarily destroy or impair a witness's believability. It is one of the circumstances that you may consider in weighing the testimony of that witness."

B. Analysis

"The applicable federal and state standards regarding prosecutorial misconduct are well established. '"A prosecutor's ... intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'"' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' [Citation.] As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion--and on the same ground--the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.] Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

It is well-settled that a claim of prosecutorial misconduct is generally reviewable on appeal only if the defense makes a timely objection at trial and asks the trial court to admonish the jury to disregard the prosecutor's question. (*People v. Sapp* (2003) 31 Cal.4th 240, 279.) A defendant's failure to object or request an admonition is excused if either would be futile or an admonition would not have cured the harm caused by the

misconduct. (*People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Earp* (1999) 20 Cal.4th 826, 858-859.)

Appellant asserts the prosecutor committed prejudicial misconduct when he asserted appellant's prior convictions should be treated as propensity evidence of his violent nature. Appellant correctly notes his prior convictions could not be used as propensity evidence in this case. Evidence that a person has a propensity or disposition to commit criminal acts is generally inadmissible, and is excluded because of its highly prejudicial nature. (*People v. Karis* (1988) 46 Cal.3d 612, 636; Evid. Code, § 1101, subd. (b).) The admissibility of character evidence was previously limited to establish some fact other than a person's character or disposition, such as motive, intent, identity, or common scheme and plan. (*People v. Karis, supra*, at p. 636; *People v. Soto* (1998) 64 Cal.App.4th 966, 983.) Evidence Code sections 1108 and 1109, however, now provide for the admission of a defendant's prior sexual offenses or acts of domestic violence as propensity evidence in criminal prosecutions for sexual offenses and domestic violence, if the evidence is not otherwise inadmissible pursuant to Evidence Code section 352. (*People v. Falsetta* (1999) 21 Cal.4th 903, 911; *People v. Pierce* (2002) 104 Cal.App.4th 893, 897; *People v. Johnson* (2000) 77 Cal.App.4th 410, 416-420.) Appellant's prior convictions for domestic violence and dissuading a witness were not admissible as propensity evidence in this prosecution for assault with a deadly weapon, discharging a firearm, and being an ex-felon in possession of a firearm. Thus, the prosecutor improperly argued that appellant's prior convictions showed his propensity for violence.

Appellant concedes the trial court admonished the jury and does not complain about the sufficiency of the court's admonition, but argues this case presents the rare situation where any type of admonition could not cure the harm or unring the bell because of the prejudicial nature of propensity evidence. Jurors are presumed to follow the court's admonitions and instructions. (*People v. Hill* (1992) 3 Cal.4th 959, 1011, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn.

13.) To determine whether an admonishment is effective, we must consider the statements in context. (*People v. Herring* (1993) 20 Cal.App.4th 1066, 1074.) *People v. Hill, supra*, 17 Cal.4th 800, infamously involved "a constant barrage of [the prosecutor's] unethical conduct, including misstating the evidence, sarcastic and critical comments demeaning defense counsel, and propounding outright falsehoods," (*id*. at p. 821) such that the court's admonitions were insufficient to cure the harm. "Given ... the onslaught of the misconduct that occurred in this case, it became increasingly difficult for the jury to remain impartial. 'It has been truly said: "You can't unring a bell."' [Citation.] Here, the jury heard not just a bell, but a constant clang of erroneous law and fact." (*Id*. at pp. 845-846.)

Such a situation was not present in the instant case. Since the argument at issue was neither outrageous nor shocking, an admonition was adequate to cure the harm, if any, from the prosecutor's comments, and there is nothing in the record to suggest that the jury did not heed the court's limiting instructions. (*People v. Waidla* (2000) 22 Cal.4th 690, 725.) The prosecutor's discussion of appellant's prior convictions as propensity evidence was brief and limited, and the court's prompt, vigorous, and sharply worded admonition was more than sufficient to cure any harm arising from the prosecutor's closing argument. (See, e.g., *People v. Bolton* (1979) 23 Cal.3d 208, 215, fn. 5; *People v. Price* (1991) 1 Cal.4th 324, 455.)

Appellant asserts the prosecutor's misconduct was prejudicial because there were conflicts between the prosecution's own witnesses as to the sequence of events on Ray's property. Appellant posits the jury would have been more likely to believe his testimony that he never used or fired a gun on Ray's property that day, or that he only fired it in self-defense, absent the prosecutor's improper use of his prior convictions as evidence for his purported propensity for violence.

While Ray and Brian Campbell offered conflicting testimony about some details, they consistently testified that appellant arrived on the property, exchanged profanities

with Ray, produced a handgun, and fired one shot in Ray's direction. Campbell thought that appellant pulled the gun because Ray raised the shovel; Ray insisted appellant fired at him before he even reached for the shovel. When appellant testified, however, he did not rely on Campbell's account and claim that he fired the gun in self-defense. Instead, appellant testified he never had a gun that day, he never fired a gun, no one fired a gun, and Campbell and Ray lied about the entire incident. Appellant also claimed he subsequently tried to leave his own property by driving through an orchard, which left his truck stuck in an embankment. Appellant admitted he tried to drive through the orchard, instead of using the street, because "there were sheriffs out there," and left his truck in the dirt and walked to Sanger.

Appellant's credibility was also severely undermined during cross-examination about the parking incident at the police department. As set forth *ante*, appellant was heavily impeached with his inconsistent testimony as to whether or not he knew that he was in a restricted parking area, whether an officer was trying to get him to move, and whether he subsequently evaded police. Indeed, appellant asserted every prosecution witness, including the officers who watched the parking incident, lied about his conduct.

The jury was thus faced with a credibility determination between Campbell and Ray, who testified appellant possessed a gun and fired one shot at Ray, and appellant, who insisted he never had a gun, he left Ray's property when he learned Ray did not have his money, and he just happened to try and leave his own property through the orchard instead of using the street. Appellant's credibility was literally left in ruins after his trial testimony. Given the entirety of the record, the prosecutor's misconduct was not prejudicial pursuant to either *Chapman v. California* (1967) 386 U.S. 18, 24, or the lesser standard of *People v. Watson* (1956) 46 Cal.2d 818, 836.

II.

REMAND FOR RESENTENCING

In counts I and II, appellant was convicted of assault with a firearm against Ray and Matt Minter. At the sentencing hearing, the court imposed two consecutive third strike terms for these counts. The court commented that the term for count II was "required to be consecutive."

Appellant contends, and respondent concedes, the court improperly believed that consecutive terms were mandatory for counts I and II. The parties also agree the court retained discretion to impose either consecutive or concurrent third strike terms because counts I and II occurred on the same occasion but involved multiple victims. (*People v. Deloza* (1998) 18 Cal.4th 585, 594-595; *People v. Hendrix* (1997) 16 Cal.4th 508, 512-515.)

Respondent insists, however, the matter cannot be remanded for resentencing because appellant failed to object at the sentencing hearing and thus waived any error. Respondent's attempt to apply the waiver doctrine to a discretionary sentencing decision is misplaced. "An erroneous understanding by the trial court of its discretionary power is not a true exercise of discretion." (*People v. Bruce G.* (2002) 97 Cal.App.4th 1233, 1247-1248.) "Defendants are entitled to sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that 'informed discretion' than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record. [Citation.]" (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.) Thus, the matter must be remanded for the court to exercise its discretion as to counts I and II.

III.

THE COURT'S ORDER FOR DNA SAMPLES

Appellant raises several constitutional challenges to the court's sentencing order for him to give blood and saliva samples for DNA testing pursuant to section 296. Appellant's constitutional challenges were rejected in *People v. King* (2000) 82 Cal.App.4th 1363, 1370-1378, and *Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 505-512. Appellant concedes *King* and *Alfaro* rejected these arguments, but asserts the reasoning in these cases is contrary to the United States Supreme Court's decisions in *City of Indianapolis v. Edmond* (2000) 531 U.S. 32, and *Ferguson v. City of Charleston* (2001) 532 U.S. 67. In *People v. Adams* (2004) 115 Cal.App.4th 243, 255-259, however, the court rejected the identical argument that *Alfaro* and *King* were contrary to *Edmond* and *Ferguson*. We agree with the reasoning and rationales set forth in *King*, *Alfaro*, and *Adams*, and reject appellant's challenges to section 296.

DISPOSITION

The sentences imposed on counts I and II are vacated and the matter is remanded to the trial court for resentencing on those counts. In all other respects the judgment is affirmed.

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HARRIS, Acting P.J.

I CONCUR:

_____
GOMES, J.

WISEMAN, J.

I join in the majority opinion in all respects with the exception of Part III, in which I concur in the result only. Unlike the majority, I do not agree with the rationale of *People v. King* (2000) 82 Cal.App.4th 1363, *Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, and *People v. Adams* (2004) 115 Cal.App. 4th 243, and would not apply their analysis here. Instead, I would conclude that the taking of blood and saliva samples for DNA testing pursuant to Penal Code section 296 implicates the Fourth Amendment as it is a suspicionless search not supported by probable cause or reasonable suspicion.

That said, I would employ the analysis used by the United States Supreme Court in other suspicionless search cases where the court has approved the intrusion as long as there is a special governmental need other than the ordinary need to obtain evidence in criminal investigations *and* in which the burden on the individual's freedom is outweighed by the social interest motivating the search or seizure. (See, e.g., *Illinois v. Lidster* (2004) 124 S.Ct. 885 [roadblock stopping cars to inquire about hit-and-run accident held to be constitutional even though no individualized suspicion of occupants as primary purpose was to obtain information about a crime—not to determine whether occupants had committed one]; *Indianapolis v. Edmond* (2000) 531 U.S. 32 [blanket stops of motorists at roadblocks violates Fourth Amendment in absence of special need on part of law enforcement]; *Ferguson v. Charleston* (2001) 532 U.S. 67 [pregnant patients tested for cocaine without consent, in absence of any individualized suspicion, is unreasonable as there is no special need justifying the search].)

The DNA Act authorizes the California Department of Justice to "collect" samples from convicted felons for "forensic identification profiles" for use in the California's DNA database. (Pen. Code, § 296.2, subd. (b).) Further, the analysis is permitted "only for identification purposes." (Pen. Code, § 295.1.) In my view, the DNA Act fits into the existing special-needs doctrine, so there is no need to create a new class of suspicionless searches and seizures justified by balancing alone, as the courts in *King, Alfaro,* and *Adams* would do. Although the needs addressed by the DNA Act are unquestionably

law-enforcement needs, they qualify as "'special needs, beyond the *normal* need for law enforcement ….'" (*Griffin v. Wisconsin* (1987) 483 U.S. 868, 873, italics added.)

The needs addressed by the DNA Act are special for two reasons. First, the primary purpose of the DNA Act lies in its ability to link those already convicted of past crimes to future ones if they reoffend. (See Pen. Code, § 295, subd. (c).) Convicts, as a class, are far more likely than the general population to commit future crimes. Second, the nature of DNA identifying information is itself special. Like other kinds of identifying information, the level of privacy protection to which it is entitled, when it belongs to a convict, is low. Combined with this is its remarkable power to identify an individual to a very high degree of certainty. And yet this extraordinarily useful, otherwise not stringently protected, information is essentially never obtainable without some level of intrusion into the body of its owner. It is difficult to think of another situation in which information so useful to law enforcement and enjoying only a low level of Fourth Amendment protection in itself is so uniformly located in a place that enjoys strong Fourth Amendment safeguards. These are the reasons why, in my view, we should be willing here to engage in the rare practice of balancing the constitutional rights of the individual against the desires of the state.

Having identified a special need beyond that of normal law enforcement, I would then balance the social interest behind collection of DNA samples from convicted felons against defendant's privacy interests. In doing so, I would conclude that the social interest in maintaining a convict DNA database outweighs defendant's interests under these circumstances.

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Wiseman, J.